San Diego Law Review

Volume 16
Issue 2 *1979*

Article 12

3-1-1979

Liquor, the Law, and California: One Step Forward - Two Steps Backward

Joel Incorvaia

LIQUOR, THE LAW, AND CALIFORNIA: ONE STEP FORWARD—TWO STEPS BACKWARD

California's legislature recently overruled two California Supreme Court decisions which held that a commercial vendor or social host who served alcoholic beverages to an obviously intoxicated person was liable to any third party injured by the intoxicated person. After discussing the developments preceding the legislature's action, this Comment argues that the legislature's exemption of the commercial vendor from liability is unwarranted because the vendor can absorb liability costs by increasing the product's price. The Comment urges California's next legislative assembly to reestablish the commercial vendor's liability and proposes alternative theories of liability that may be used to circumvent the present legislature's action.

First the man takes a drink,
Then the drink takes a drink,
Then the drink takes the man![1]

On September 19, 1978, Governor Brown approved Senate Bill 1645.[2] This bill abrogated two recent California Supreme Court decisions: *Vesely v. Sager*[3] and *Coulter v. Superior Court*.[4] *Vesely* and *Coulter* imposed liability upon the commercial vendor[5] and the social host[6] for injuries to third persons caused by the furnishing of intoxicating liquors. Prior to these decisions, California courts followed a common-law rule that exempted any supplier of alcoholic beverages from liability for any intoxication-related injuries. S.B. 1645 mandates a return to the common-law position.

Currently, only fourteen states exempt the commercial vendor from liability by following the common-law rule.[7] The majority of

1. E. SILL, *An Adage from the Orient*, in POETICAL WORKS OF EDWARD ROWLAND SILL 320 (1906).

2. Ch. 929, 1978 Cal. Stats. (to be codified as CAL. BUS. & PROF. CODE § 25602; CAL. CIV. CODE § 1714). S.B. 1645 became effective on January 1, 1979. CAL. CONST. art. 1, § 8(c)(1).

3. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

4. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

5. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

6. Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

7. Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alaska 1950); Profitt v.

jurisdictions have abolished the common-law limitation by enacting "Dram Shop Acts"[8] or by imposing liability through tradi-

Canez, 118 Ariz. App. 235, 575 P.2d 1261 (1978); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Stringer v. Calmes, 167 Kan. 278, 205 P.2d 921 (1949); Waller's Adm'r v. Collinsworth, 144 Ky. 3, 137 S.W. 766 (1911); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Marchiondo v. Roper, 90 N.M. 367, 563 P.2d 1160 (1977); Griffin v. Sebek, — S.D. —, 245 N.W.2d 481 (1976); Shelby v. Keck, 85 Wash. 2d 911, 541 P.2d 365 (1975); Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970); Parsons v. Jow, 480 P.2d 396 (Wyo. 1971).

An argument based upon the weight of these decisions would be suspect. The decisions in Idaho, South Dakota, and Wisconsin turned on one vote. Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969) (3-2); Griffin v. Sebek, — S.D. —, 245 N.W.2d 481 (1976) (3-2); Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970) (4-3). Alaska has conflicting opinions. *Compare* Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973), *with* Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alaska 1950). The Kentucky Court of Appeals has stated: "[W]e are unwilling to say that there are no circumstances under which a licensee who sells alcoholic beverages may be held responsible in damages . . . ." Pike v. George, 434 S.W.2d 626, 629 (Ky. Ct. App. 1968). New Mexico's Supreme Court has deferred twice to its legislature on the issue of a vendor's liability. Its most recent opinion states that if the legislature does not act, the court's deference will not continue. Marchiondo v. Roper, 90 N.M. 367, 563 P.2d 1160 (1977). A Washington court of appeals has subsequently distinguished the state supreme court's decision based on the defendant's violation of a statute prohibiting the sale of intoxicating liquors to minors. Callan v. O'Neil, 20 Wash. App. 32, 578 P.2d 890 (1978). The decisions in Arizona, Idaho, Maryland, Nebraska, and South Dakota hold that liability should be imposed only by the legislature. Profitt v. Canez, 118 Ariz. App. 235, 575 P.2d 1261 (1978); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Griffin v. Sebek, — S.D. —, 245 N.W.2d 481 (1976). In California, the supreme court held the commercial vendor liable to a third party seven years before the legislature passed S.B. 1645. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

8. "Dram Shop Acts" or "Civil Damage Laws" are state statutes that provide civil remedies for injuries unprotected by the common law. Maine enacted the first legislation of this type in 1851. Note, *Liability Under the Minnesota Civil Damage Act*, 46 MINN. L. REV. 169, 170 (1961). At present, 18 states have Dram Shop Acts: ALA. CODE tit. 6, § 5-71(a) (1975); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1958); GA. CODE ANN. § 105-1205 (1968); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1978); IOWA CODE ANN. § 123.92 (West Supp. 1978); ME. REV. STAT. tit. 17, § 2002 (1964); MICH. STAT. ANN. § 18.993 (Supp. 1978); MINN. STAT. ANN. § 340.95 (West Supp. 1978); NEV. REV. STAT. § 202.055 (1973); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. §§ 4399.01-.02 (Baldwin 1973); OR. REV. STAT. § 30.730 (1977); R.I. GEN. LAWS §§ 3-11-1 to -2 (1976); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. ANN. § 176.35 (West Supp. 1978); WYO. STAT. ANN. § 12-5-502 (1977).

The language of the statutes is generally to the effect that any person who furnishes intoxicating liquor is liable in damages for any injuries occasioned "by any intoxicated person" or "in consequence of the intoxication of any person." Although this broad-brush language sounds in tort, it is generally agreed that these statutes were not enacted to alleviate the harsh results obtained at common law. *See* Hagglund & Arthur, *Common Law Liquor Liability*, 7 FORUM 73, 75 (1972); Sharp, *Dram Shop Laws and Problems*, 28 ALA. LAW. 409, 409 (1967); Comment, *Social Host Liability for Furnishing—Finding a Basis for Recovery in Kentucky*, 3 N. KY. L. REV. 229, 231 (1976). *But see* Comment, *Torts: Liability of the Social Purveyor*, 28 OKLA. L. REV. 204, 204 (1975). Rather, the statutes arose out of the

tional negligence mechanisms.[9] Despite this fact, California's legislature has immunized the commercial vendor from liability by enacting S.B. 1645. This Comment will determine whether the legislature's reestablishment of the seldom-followed minority rule is a reasonable course of action.

The Comment will commence with a discussion of the common-law rule. After this discussion the judicial and legislative developments surrounding the rule will be examined. The Comment will then focus upon the policy considerations attendant to this area of liability and conclude that in light of these considerations, the legislature's exemption of the commercial vendor from liability is an untenable position. Last, alternative theories of liability will be investigated. At common law, there were exceptions to the general rule denying liability, and these exceptions may provide a remedy against the liquor purveyor notwithstanding S.B. 1645.

---

efforts of prohibitionists to control the evils associated with liquor trafficking. *See* DeMoulin & Whitcomb, *Social Host's Liability in Furnishing Alcoholic Beverages*, 27 FED'N INS. COUNSEL Q. 349, 350 (1977); Keenan, *Liquor Law Liability in California*, 14 SANTA CLARA LAW. 46, 51 (1973).

Consequently, many statutes contain restrictions and limitations that have lost their logic and *raison d' être* with the passage of time and the end of prohibition. Alabama imposes strict liability upon the liquor purveyor. *See* Phillips v. Derrick, 36 Ala. App. 244, 54 So. 2d 320 (1951). *Phillips* examines a statute identical to Alabama's present statute, ALA. CODE tit. 6, § 5-71(a) (1975). This statute prohibits a defendant from demonstrating that due care was exercised when providing the liquor to the consumer. Other states impose liability if the defendant has contributed to the consumer's intoxication "in whole or in part." COLO. REV. STAT. § 13-21-103 (1977); ME. REV. STAT. tit. 17, § 2002 (1964); VT. STAT. ANN. tit. 7, § 501 (1972). This standard places an onerous burden upon the defendant. Once a consumer enters his tavern and imbibes but one drink, the defendant is thereafter responsible irrespective of the consumer's subsequent actions.

Dram Shop Acts can also work a hardship on plaintiffs. Some states place restrictions on the amount of damages a plaintiff may recover. CONN. GEN. STAT. ANN. § 30-102 (West 1958); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1978); MINN. STAT. ANN. § 340.95 (West Supp. 1978). States that do not impose restrictions upon damages may limit standing to a specified class of persons. GA. CODE ANN. § 105-1205 (1968); NEV. REV. STAT. § 202.055 (1973); OR. REV. STAT. § 30.730 (1977); WYO. STAT. ANN. § 12-5-502 (1977). Statutes that contain notice requirements pose an additional obstacle to plaintiffs: If the vendor does not receive notice, prior to sale, that the liquor must not be dispensed, he cannot be held liable. COLO. REV. STAT. § 13-21-103 (1973); R.I. GEN. LAWS §§ 3-11-1 to -2 (1976); WIS. STAT. ANN. § 176.35 (West Supp. 1978). Thus, even though an injured party may have a remedy against a liquor purveyor under accepted principles of negligence, an illogical provision in an antiquated Dram Shop Act may prevent recovery.

9. *E.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

THE COMMON-LAW RULE DENYING LIABILITY

At common law, the gift or sale of intoxicating liquor to an ablebodied man was not a tort.[10] Consequently, no liability was imposed upon the commercial vendor or social host for furnishing intoxicating liquor to a customer or guest who injured himself[11] or an innocent third party[12] as a result of his intoxication.

The foundation of the common-law rule was the notion that the consumption rather than the furnishing of the liquor was the proximate cause of the injury.[13] The rationale was that although there might be a sale without intoxication, there could be no intoxication without consumption.[14] Further support for the rule was found in a prevailing concept of common-law justice—the ethic of individual responsibility.[15] Courts believed that those who drank excessively should be solely responsible for the deleterious results wrought by their intoxication.[16]

Prior to 1971, California courts uniformly adhered to the common-law rule.[17] Although this adherence engendered harsh results, the courts believed that any changes in the rule would require legislative action.[18] This position was abandoned by the California Supreme Court in *Vesely v. Sager*.[19]

---

10. Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889); H. BLACK, A TREATISE ON THE LAWS REGULATING THE MANUFACTURE AND SALE OF INTOXICATING LIQUORS § 281 (1892); 45 AM. JUR. 2d *Intoxicating Liquors* § 553 (1969). It is interesting that the rule stated in *Cruse* was dictum with citation to analogous authority only.

11. In addition to the common-law rule, the liquor purveyor could rely heavily upon the affirmative defense of contributory negligence. *E.g.*, King v. Henkie, 80 Ala. 505 (1886). *See* Keenan, *Liquor Law Liability in California*, 14 SANTA CLARA LAW. 46, 71-75 (1973); Comment, *Negligence Actions Against Liquor Purveyors: Filling the Gap in South Dakota*, 23 S.D. L. REV. 227, 230 (1978).

12. 45 AM. JUR. 2d *Intoxicating Liquors* § 553 (1969); Annot., 75 A.L.R.2d 833 (1961).

13. King v. Henkie, 80 Ala. 505 (1886); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966); Parsons v. Jow, 480 P.2d 396 (Wyo. 1971).

14. Collier v. Stamatis, 63 Ariz. 285, 290, 162 P.2d 125, 127 (1945).

15. Johnson, *Drunken Driving—The Civil Responsibility of the Purveyor of Intoxicating Liquor*, 37 IND. L.J. 317, 323 (1962).

16. "Human beings, drunk or sober, are responsible for their own torts." State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 254, 78 A.2d 754, 756 (1951).

17. The rule was first stated by way of dictum in Lammers v. Pacific Elec. Ry., 186 Cal. 379, 199 P. 523 (1921). The rule was thereafter followed in three major cases: Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943) (dictum).

18. *E.g.*, Cole v. Rush, 45 Cal. 2d 345, 354, 289 P.2d 450, 456 (1955).

19. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). Two landmark cases are discussed at length in *Vesely*. The decisions undoubtedly provided some impetus to the *Vesely* court's decision, and they are worth noting. In Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), the plaintiffs, residents of Michigan, brought an action against three Illinois tavern keepers for selling liquor to Illinois residents who drove their automobile into Michigan and collided with the plain-

CALIFORNIA'S JUDICIAL AND LEGISLATIVE RESPONSE TO THE COMMON-LAW RULE

The Court and the Commercial Vendor

The complaint in *Vesely* alleged that the defendant, Sager, owned and operated the Buckhorn Lodge, a tavern located near the top of Mount Baldy in California's San Bernardino County. On the evening of April 8, 1968, Sager served intoxicating liquors to his customer, O'Connell, from approximately 10 p.m. until 5:15 the following morning. As the evening progressed, Sager realized that O'Connell was becoming excessively intoxicated and that he "was 'incapable of exercising the same degree of volitional control over his consumption of intoxicants as the average reasonable person.' "[20] Sager also knew that when O'Connell left the lodge, he would drive down a steep, winding, narrow mountain road. After leaving the tavern, O'Connell crossed into the opposing lane of traffic while traveling the mountain road and collided with Vesely's vehicle.

The trial court dismissed Vesely's claim for damages against Sager pursuant to the common-law rule then in effect. On appeal, the California Supreme Court reversed the dismissal and held that liability may be imposed upon a vendor of intoxicating liquors for providing liquor to an obviously intoxicated customer who, as a result of his intoxication, injures a third person.[21]

The first issue the court examined was the common-law notion that the consumption of liquor is the proximate cause of all intox-

---

tiffs' vehicle. Both Michigan and Illinois had a Dram Shop Act, but neither Act applied extraterritorially. Nevertheless, the court held that the complaint stated a cause of action under Michigan common law. This finding was based on the tavern keepers' violation of an Illinois statute making it a misdemeanor to furnish liquor to intoxicated individuals. This statute imposed a duty upon the Illinois tavern keepers, the breach of which made them liable to the Michigan plaintiffs. In Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), a widow brought an action against four tavern keepers for selling liquor to an obviously intoxicated minor whose vehicle collided with her husband. As in *Waynick*, the court based its analysis on a statute providing criminal sanctions for furnishing liquor to intoxicated individuals or minors. The court determined that the statute was enacted to protect members of the general public and concluded that "[i]f the patron is a minor or is intoxicated when served, the tavern keeper's sale to him is unlawful; and if the circumstances are such that the tavern keeper knows or should know that the patron is a minor or is intoxicated, his service . . . may . . . constitute common law negligence." *Id.* at 202, 156 A.2d at 9.

20. 5 Cal. 3d at 157-58, 486 P.2d at 154, 95 Cal. Rptr. at 626 (quoting plaintiff's complaint).

21. *Id.* at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.

ication-related injuries. In a unanimous opinion, the court stated that the *furnishing* of alcoholic beverages to an intoxicated patron could be a proximate cause of injuries inflicted by that patron upon a third person.[22] This conclusion was based upon the belief that the *consumption* of the liquor may be only a foreseeable intervening cause of the injury-producing conduct.[23] The court's reasoning is clearly a marked departure from the common-law notion of proximate cause. However, the court stated that the central issue in *Vesely* was not one of proximate cause, but rather one of duty.[24]

The existence of a duty can be determined by diverse methods.[25] In *Vesely*, the court held that Sager owed a duty to Vesely based upon California Business and Professions Code section 25602.[26] This statute provides: "Every person who sells, furnishes [or] gives . . . any alcoholic beverages to any . . . obviously intoxicated person is guilty of a misdemeanor."[27] This statute is clearly penal in character and does not provide for civil liability. Nevertheless, the court reasoned that because the statute was "adopted for the purpose of protecting members of the general public from injuries . . . resulting from the excessive use of intoxicating liquor,"[28] a presumption of negligence arises whenever its provisions are violated.[29] Consequently, the court concluded that because Sager violated the statute by serving alcoholic beverages to O'Connell while he was obviously intoxicated, Sager was pre-

22. *Id.* at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631.

23. *Id.*

24. *Id.*

25. Apart from the method used in *Vesely*, a court may determine the existence of a duty by balancing social interests and policies. *See* W. PROSSER, THE LAW OF TORTS § 53 (4th ed. 1971).

26. 5 Cal. 3d at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.

27. CAL. BUS. & PROF. CODE § 25602 (West 1964).

28. 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631. The court stated that this reasoning was compelled by CAL. BUS. & PROF. CODE § 23001 (West 1964). In pertinent part, this statute provides:

> This division [including section 25602] is [enacted] for the protection of the safety, welfare, health, peace and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages.

29. This presumption is codified in CAL. EVID. CODE § 669(a) (West Supp. 1978). This § provides:

> (a) The failure of a person to exercise due care is presumed if:
> (1) He violated a statute . . . ;
> (2) The violation proximately caused death or injury to person or property;
> (3) The death or injury resulted from an occurrence of the nature which the statute . . . was designed to prevent; and
> (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute . . . was adopted.

sumed to have breached the duty of due care that he owed Vesely. Although section 25602 applies to "every person," the *Vesely* court expressly stated that its holding was limited to commercial vendors.[30] In April, 1978, the court lifted this limitation in *Coulter v. Superior Court*.[31]

The Court and the Social Host

In *Coulter*, the complaint alleged that the plaintiff was injured when the car in which he was riding as a passenger collided with roadway abutments.[32] The driver of the vehicle, Janice Williams, had been served large quantities of alcoholic beverages immediately before the accident. These beverages were furnished in the recreation room of an apartment complex which was owned and operated by defendant Schwartz & Reynolds & Co. and managed by defendant Montgomery.

The complaint further alleged that the defendants knew or should have known that Williams "customarily drank to excess"[33] and was "incapable of exercising the same degree of volitional control over her consumption of alcoholic beverages as the average reasonable person;"[34] that Williams was becoming "excessively intoxicated"[35] on this occasion; that the defendants knew that Williams intended to operate an automobile following her consumption of the alcoholic beverages; and that the defendants knew or should have known that their conduct would expose third persons such as the plaintiff to "foreseeable serious risk of harm."[36]

Justice Richardson penned the opinion and concluded that the allegations established a cause of action against the defendants. This conclusion was grounded upon two propositions. First, section 25602 of the California Business and Professions Code is not limited to persons who furnish liquor to others for a profit.[37] Sec-

30. 5 Cal. 3d at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.
31. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).
32. The plaintiff's wife, Deborah Coulter, joined in the action with her husband and claimed as damages loss of consortium and the value of nursing services rendered to her husband. *Id.* at 147, 577 P.2d at 670, 145 Cal. Rptr. at 536.
33. *Id.* at 148, 575 P.2d at 671, 145 Cal. Rptr. at 536.
34. *Id.*
35. *Id.*
36. *Id.*
37. *See* text accompanying note 24 *supra*. As stated, § 25602 is a misdemeanor statute that penalizes *every person* who furnishes alcoholic beverages to an obvi-

ond, a social host or other noncommercial provider of alcoholic beverages, regardless of statute, owes to the general public a duty to refuse to furnish such beverages to an obviously intoxicated person if the person constitutes a reasonably foreseeable danger or risk of injury to third persons.[38]

The Legislature

Less than five months after the *Coulter* decision, Governor Brown approved S.B. 1645.[39] As stated in the introduction, S.B. 1645 exempts *both* the social host and the commercial vendor from civil liability[40] for furnishing intoxicating liquors. The bill also reestablishes the common-law notion that the consumption of liquor, rather than the furnishing of it, is the proximate cause of any injuries. In pertinent part, the bill reads:

> No person who sells, furnishes [or] gives . . . any alcoholic beverage [to any habitual or common drunkard or to any obviously intoxicated person] shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.
>
> *The Legislature hereby declares that this section shall* be interpreted so that the holdings in cases such as *Vesely v. Sager* . . . and *Coulter v. Superior Court* . . . be abrogated in favor of prior judicial interpretation . . . .[41]

Initially, the legislature's resurrection of the common-law notion of proximate cause is difficult to comprehend. Common sense compels a conclusion that any intoxication-related injury can be caused by both the consumption and the furnishing of the

---

ously intoxicated individual. The court reasoned that on its face this statute applies with equal force to commercial vendors and to social hosts. More important, the court determined that the legislature intended the statute to apply to social hosts or, perhaps more accurately, that the legislature did not intend to exclude judicial imposition of liability upon the social host. *See* 21 Cal. 3d at 150-52, 575 P.2d at 672-73, 145 Cal. Rptr. at 537-38.

38. The court's imposition of this duty is based upon an analysis of certain factors. These factors include

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevelance of insurance for the risk involved.

Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1969). For the court's discussion of these factors, *see* 21 Cal. 3d at 153-54, 577 P.2d at 674-75, 145 Cal. Rptr. at 539-40.

39. Ch. 929, 1978 Cal. Stats. (to be codified as CAL. BUS. & PROF. CODE § 25602; CAL. CIV. CODE § 1714).

40. However, "[e]very person who sells, furnishes, [or] gives . . . any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a *misdemeanor*." *Id.* § 1 (emphasis added).

41. *Id.* (emphasis added).

liquor. However, because proximate cause is often an instrument of social policy,[42] the legislature's action is not as incomprehensible as it would otherwise appear to be.

California's legislature does not publish a record of its findings and debates. Consequently, it is extremely difficult to determine which social policies the legislators considered sufficiently important to warrant the enactment of S.B. 1645.[43] The following section will set forth the relevant policy considerations and determine their applicability to the social host and the commercial vendor.

THE SOCIAL HOST V. THE COMMERCIAL VENDOR: A QUESTION OF POLICY

Enterprise Liability: The Cost of Doing Business

The cornerstone of the enterprise liability theory is the principle that an entrepreneur is best equipped to absorb the cost of any losses that might accompany the sale of his product.[44] Unlike the individual, the entrepreneur can distribute losses or insurance costs to the buying public by raising the price of the product. This theory clearly applies to the commercial vendor of intoxicating liquors.[45]

The vendor, simply by raising the price of a drink, can compensate or insure against the losses caused by the purveyance of al-

42. W. PROSSER, THE LAW OF TORTS § 41 (4th ed. 1971). "[P]roximate causation is a matter of public policy and therefore subject to the changing attitudes and needs of society." Vance v. United States, 355 F. Supp. 756, 761 (D. Alaska 1973).

43. To determine the legislative intent of S.B. 1645, this writer mailed a questionnaire (on file with the *San Diego Law Review*) to every Senator and Assemblyman who voted on the bill. The questionnaire asked five questions: "Do you believe the commercial vendor should be held liable? Why? Do you believe the social host should be held liable? Why? If you answered the above questions differently, why did you vote as you did?"

The writer mailed 102 questionnaires and received a grand total of eight responses. Two responses did not answer the questions asked. Unfortunately, the legislature's collective state of mind concerning these questions cannot be determined from six responses.

44. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1120 (1960).

45. "If normal economic principles hold true, the costs of higher insurance premiums for the vendor would be absorbed by an increase in the price of alcoholic beverages offered to the public." Comment, *Negligence Actions Against Liquor Purveyors: Filling the Gap in South Dakota*, 23 S.D. L. REV. 227, 232 (1978).

cohol.[46] Moreover, the consumers absorbing this increase will be those who imbibe alcohol. Because these consumers are the very persons who generate the risk-producing activity, it is both sensible and equitable to require them to absorb the increased prices.[47]

Vendors argue that the cost of insurance is not affordable.[48] Assuming that premium increases are based upon actual loss experience,[49] what follows from the vendor's argument is that the consumer is no longer willing to purchase the product when it reflects the losses it generates. Once this state is reached, the losses must be decreased or the product must be removed from the market place. An argument that contends liability should not be imposed upon the commercial purveyor because he cannot afford to pay for the damages his product engenders has no merit.

As opposed to the commercial vendor, the social host does not furnish alcoholic beverages for pecuniary gain. The host's purveyance is generally an act of hospitality and generosity. Consequently, the host would have to absorb personally the cost of any insurance or damage awards. Thus, imposition of liability on the social host does not comport with the principle of the enterprise liability theory.[50]

"Obviously Intoxicated"

> Not drunk is he who from the floor
> Can rise alone and still drink more;
> But drunk is he, who prostrate lies,
> Without the power to drink or rise.[51]

---

46. In 1972 there were 9,624 "drinking places" in California. The total sales of these establishments amounted to $668,150,000. U.S. BUREAU OF THE CENSUS, CENSUS OF RETAIL TRADE 1972, AREA SERIES, CALIFORNIA, RC 72-A-5 1974 (table 1). "Drinking places" are establishments engaged primarily in the retail sale of drinks. STATISTICAL POLICY DIVISION, OFFICE OF MANAGEMENT AND BUDGET, UNITED STATES EXECUTIVE OFFICE OF THE PRESIDENT, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 1972, at 271. These figures indicate that the commercial vendor is well-equipped to absorb the losses his business causes.

47. "[T]he cost of the vendor's liability insurance will be reflected in the price of his product, resulting in the cost of liquor-caused injuries being borne ultimately by the class of imbibers." Comment, *Dram Shop Liability—A Judicial Response*, 57 CALIF. L. REV. 995, 1017 (1969).

48. *See* Kindt v. Kauffman, 57 Cal. App. 3d 845, 874 n.11, 129 Cal. Rptr. 603, 622 n.11 (1976); L.A. Daily Journal, Sept. 6, 1978, at 19, col. 4.

49. "If the increases are not based upon loss experience, they are indicative of a need for inquiry into the rate-fixing practices of the insurance industry." Kindt v. Kauffman, 57 Cal. App. 3d 845, 874 n.11, 129 Cal. Rptr. 603, 622 n.11 (1976).

50. DeMoulin & Whitcomb, *Social Host's Liability in Furnishing Alcoholic Beverages*, 27 FED'N INS. COUNSEL Q. 349, 357 (1977).

51. Cooper v. National R.R. Passenger Corp., 45 Cal. App. 3d 389, 394 n.1, 119 Cal. Rptr. 541, 544 n.1 (1975). In *Cooper*, Justice Fleming stated: "Visual diagnosis of intoxication has not greatly improved upon [this] rough and ready classification . . . ." *Id.*

The supreme court, in *Vesely*, determined that the duty of due care owed to third persons arose when liquor was given to an "obviously intoxicated" individual. However, to determine when a person is "obviously intoxicated" is a difficult question indeed. In *Coulter*, the court adopted a standard announced in *People v. Johnson*:[52]

> The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are "plain" and "easily seen or discovered." If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.[53]

Although this standard may prove workable within the context of a commercial transaction, it should not be used to impose liability upon the social host.[54]

The commercial vendor is akin to an expert in his field. His daily observations of those who drink intoxicating liquors results in his familiarity with the manifestations of an intoxicated individual. The social host, on the other hand, is not in the business of dispensing alcoholic beverages. His contacts with the inebriate occur less frequently. Consequently, the host has greater difficulties discerning the manifestations indicative of intoxication.[55] In *Cooper v. National Railroad Passenger Corp.*,[56] Justice Fleming aptly observed: "Obvious intoxication is often recognizable only after the fact, and what is patent when the drinker falls off his stool . . . may have been only latent 60 seconds earlier."[57]

Large social gatherings create additional problems. At wedding receptions, class reunions, and large parties, the host will not be

52. 81 Cal. App. 2d Supp. 973, 185 P.2d 105 (1947).

53. *Id.* at 975-76, 185 P.2d at 106 (emphasis original). The *Coulter* court stated that although the phrase "obviously intoxicated" is "contained in section 25602, a *criminal* statute, . . . the courts have experienced no discernible difficulty in applying it." 21 Cal. 3d at 155, 577 P.2d at 675, 145 Cal. Rptr. at 540 (emphasis original). *See* Samaras v. Department of Alcoholic Bev. Control, 180 Cal. App. 2d 842, 844, 4 Cal. Rptr. 857, 858 (1960); People v. Smith, 94 Cal. App. 2d Supp. 975, 977-78, 210 P.2d 98, 99-100 (1949).

54. *See generally* Cooper v. National R.R. Passenger Corp., 45 Cal. App. 3d 389, 394 n.1, 119 Cal. Rptr. 541, 544 n.1 (1975).

55. *Id.* An additional problem is created by consumers who appear sober when they are inebriated and those who appear inebriated when they are in fact sober. *See generally* Note, *Statutory Interpretation of the "Dram Shop Act"—The Majority Rule*, 49 N.D. L. REV. 72, 80 (1972).

56. 45 Cal. App. 3d 389, 119 Cal. Rptr. 541 (1975).

57. *Id.* at 394 n.1, 119 Cal. Rptr. at 544 n.1.

able to observe all guests and to determine their states of intoxication before they receive drinks.[58] The commercial vendor, however, necessarily confronts his patron whenever a sale is made.[59] This confrontation affords the vendor an opportunity to observe his patron's demeanor and to refuse service if the patron seems obviously intoxicated.

Deterrence, Supervision, and Refusal to Serve

Another policy suggested for imposing civil liability upon the liquor purveyor is to deter the purveyor from furnishing alcoholic beverages to obviously intoxicated individuals.[60] In a commercial setting, this reasoning is well-founded.

The commercial vendor knows or should know of the civil liabilities attendant to his profession. By continually observing his patrons[61] and refusing to serve them if they are obviously intoxicated, the vendor knows that he can avoid liability. The same cannot be said for the social host.

As opposed to the commercial vendor, a social host furnishes alcoholic beverages only at social gatherings, and these gatherings do not occur as frequently as the vendor's daily sale of liquor. The social host is less likely to be aware of any civil liability that may accrue from furnishing intoxicating liquors.[62] Assuming, however, that the social host is aware of the potential liability, it is arguable whether the host can effectively police the activities of his guests.[63] Furthermore, even if he were in continual contact with his guests, it is unrealistic to expect that any admonition from the host to the guest that "he has had enough" would be effective.

---

58. Note, *Statutory Interpretation of the "Dram Shop Act"—The Majority Rule*, 49 N.D. L. REV. 72, 80 (1972).

59. *Id.*

60. Comment, *Torts—Negligence—Social Host Who Furnishes Alcoholic Beverages to Minor May Be Held Liable for Minor's Negligent Acts*, 8 RUT.-CAM. L.J. 719, 723 (1977).

61. This argument assumes that any knowledge the vendor's employee has concerning a patron's state of intoxication should be imputed to the vendor.

62. *See* DeMoulin & Whitcomb, *Social Host's Liability in Furnishing Alcoholic Beverages*, 27 FED'N INS. COUNSEL Q. 349, 357 (1977).

63.

> [E]xtending liability to the noncommercial vendor would result in great social pressure being applied to such individuals and require their policing the activities of friends and social guests. Assuming for the moment that such results are beneficial, it is questionable just how much success an individual would have in playing out his role in the atmosphere of a private gathering.

Garcia v. Hargrove, 46 Wis. 2d 724, 734, 176 N.W.2d 566, 570-71 (1970).

FINDING A BASIS FOR RECOVERY IN CALIFORNIA: ALTERNATIVE THEORIES OF LIABILITY

As stated previously, S.B. 1645 "abrogate[s] [*Vesely* and *Coulter*] in favor of *prior judicial interpretation* finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries . . . ."[64] At first blush, the bill seems to preclude the imposition of any liability upon the liquor purveyor. Upon closer examination, the blush fades.

To obviate the harsh results obtained at common law, courts developed exceptions to the general rule denying liability, and California's "prior judicial interpretation" has recognized or followed these exceptions.[65] Based upon these exceptions, an injured party may have a cause of action against the liquor purveyor notwithstanding S.B. 1645.

The Aggravating Circumstances Exception at Common Law

As previously elucidated, the common-law rule applied only when there was a sale or gift of intoxicating liquor to an *able-bodied* man.[66] This qualification provided courts with a mechanism that could be used to circumvent the rule's application. An often-cited decision that illustrates this procedure is *McCue v. Klein*,[67] an early Texas decision.

In *McCue*, the consumer was "an habitual drunkard, who, from long and excessive use of spirituous liquors, had so beclouded his mind and fettered his will that he was wholly incapable of resisting his appetite for strong drink . . . ."[68] The defendants, with full knowledge of the consumer's circumstance, conspired to in-

64. Ch. 929, § 1, 1978 Cal. Stats. (emphasis added) (to be codified as CAL. BUS. & PROF. CODE § 25602; CAL. CIV. CODE § 1714).

65.

> "It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." The failure of the legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.

Cole v. Rush, 45 Cal. 2d 345, 355, 289 P.2d 450, 456 (1955) (quoting Buckley v. Chadwick, 45 Cal. 2d 183, 200, 288 P.2d 12, 22 (1955)).

66. *See* note 10 and accompanying text *supra*.

67. 60 Tex. 168 (1883).

68. *Id.* at 169.

duce him to swallow three pints of whiskey in quick succession. After the consumer had ingested two of the three pints, a bystander warned the defendants that the imbibition of the remaining pint would cause the consumer's death. Unfortunately for both the consumer and the defendants, the bystander's prediction proved accurate. The court adjudged the defendants liable and granted relief to the deceased's widow.

Several elements that are prerequisites to a cause of action under an aggravating circumstances exception can be gleaned from *McCue*. Because the gravamen of the exception is that the consumer is not ablebodied when he drinks the liquor, it follows that plaintiff must first prove the consumer was unable to resist drinking the liquor.[69] If the plaintiff can pass this barrier, he must then show that the defendant had knowledge of the consumer's circumstance[70] and, notwithstanding this knowledge, continued to furnish the liquor that caused the consumer's death.[71] Once plaintiff proves these elements, he has established a cause of action against the purveyor.[72] *McCue* is silent, however, as to whether the cause of action is applicable to both commercial and social purveyors of liquor. *Ibach v. Jackson*[73] suggests that the *McCue* exception is available in both instances.

The facts in *Ibach* are unappetizing at best. The complaint alleged that the defendant enticed the plaintiff's intestate to his hotel room and plied her with liquor until she had lost all sense of reason and volition. Unable to control her movements while in such a state, the deceased fell and sustained severe injuries. Although the defendant knew that that the deceased was intoxicated and severely injured, he abandoned her. Shortly thereafter, she died.

A cursory glance at the opinion indicates that the *Ibach* court intended to apply the *McCue* holding. The court first extracted

---

69. *Id.* at 170.
70. *Id.*
71. *Id.*
72. Commentators agree with this analysis. *See* Johnson, *Drunken Driving —The Civil Responsibility of the Purveyor of Intoxicating Liquor*, 37 IND. L.J. 317, 318 (1962); Keenan, *Liquor Law Liability in California*, 14 SANTA CLARA LAW. 46, 49 (1973); Sharp, *Dram Shop Laws and Problems*, 28 ALA. LAW. 409, 414 (1967). However, it must be noted that the court spoke in terms of assault:

> Admitting that the allegations show that the deceased had, at the time he consented to drink such an excessive quantity of spirits, sufficient consciousness to know the injury it was likely to cause him, still the act of the defendants cannot be excused because he consented to an experiment which might end in his death, or at least in doing him great bodily harm. The rule of law is clear that consent to an assault is no justification.

60 Tex. at 170.
73. 148 Or. 92, 35 P.2d 672 (1934).

the allegations of the plaintiff's complaint necessary to establish a cause of action under *McCue*: that the deceased had "lost all sense of reason and volition" and that the defendant continued to serve intoxicating liquor to her despite his knowledge of her condition.[74] The court then quoted extensively from *McCue*[75] and concluded that the plaintiff's complaint stated a cognizable claim for damages. The court did not, however, discuss *Ibach*'s most distinguishing feature—the fact that the defendant was a social host rather than a commercial vendor. Neither *Ibach* nor *McCue* have been cited in California's decisional law. However, California courts have considered analogous factual patterns.

The Aggravating Circumstances Exception Under California Law

The leading pre-*Vesely* case in California is *Cole v. Rush*.[76] In *Cole*, the plaintiff, Mrs. Cole, brought an action for the death of her husband, who was killed while fighting with one of the defendant's customers. The complaint alleged that the defendant knew that Mr. Cole, although "normally of quiet demeanor,"[77] became "belligerent, pugnacious and quarrelsome"[78] when drunk. Furthermore, the complaint stated that Mrs. Cole had on numerous occasions requested the defendants "not to sell or furnish intoxicating beverages to [her husband] *sufficient to allow him to become intoxicated thereon.*"[79] Despite these allegations, the court denied relief to Mrs. Cole. The court indicated, however, that if Mrs. Cole had alleged that her husband was not a "competent person," the complaint would have stated a cause of action.[80] Although the *Cole* court did not state what constitutes a "competent" person, *Dwan v. Dixon*[81] sheds some light on the definition.

In *Dwan*, the plaintiff and his parents were riding in an automobile which collided with Froberg's vehicle. Before the accident, Froberg had consumed several drinks while visiting the defendants, Frank and Marie Dixon. The plaintiff's original complaint al-

74. *Id.* at 96, 35 P.2d at 674.
75. *Id.* at 103-04, 35 P.2d at 677.
76. 45 Cal. 2d 345, 289 P.2d 450 (1955).
77. *Id.* at 347, 289 P.2d at 451.
78. *Id.*
79. *Id.* (emphasis original).
80. *Id.* at 356, 289 P.2d at 457.
81. 216 Cal. App. 2d 260, 30 Cal. Rptr. 749 (1963).

leged that the Dixons had furnished the beverages to Froberg even though they knew that Froberg was strongly influenced by the use of alcohol and that his demeanor did not always reveal this influence. Additionally, the complaint stated that the Dixons knew that Froberg would be operating his automobile when he left their home. On these allegations, the lower court entered a demurrer with leave to amend.

The plaintiff's amended complaint averred that the Dixons had "conducted"[82] Froberg to his car, put him into it, headed him for the highway, and "aided and abetted"[83] him in driving it away from the premises. Once again, the court dismissed the plaintiff's complaint. However, this time the dismissal was entered on procedural grounds.

To support their original complaint, the plaintiffs had filed affidavits. These affidavits stated that the Dixons had neither "put" Froberg into his vehicle nor "aid[ed] and assist[ed]" him in leaving the premises.[84] The court stated that on these facts the standards of truthful pleading required a dismissal of the amended complaint. However, if the court had not dismissed the amended complaint on procedural grounds, the alleged aggravating circumstances would have stated a cause of action regardless of the common-law rule then in effect. Although the *Dwan* court did not cite *McCue* or *Ibach*, the analogies are apparent.

According to *McCue* and *Ibach*, the plaintiff must demonstrate that: (1) the consumer was in such a state as to be deprived of his reason and willpower, and (2) the defendant continued to furnish alcohol to the consumer even though he knew of the consumer's condition. In *Dwan*, the plaintiffs alleged that the Dixons knew that Froberg was a heavy drinker, that Froberg was easily influenced by the use of alcohol, that Froberg's intoxicated condition was not manifested in a change of demeanor, and that the Dixons "put" Froberg into his car. Although these allegations do not approach the level of aggravation displayed in *McCue* and in *Ibach*, the *Dwan* court indicated that the allegations would have prevented the application of the common-law rule if they had been pleaded truthfully. A decision of recent vintage that buttresses this indication is *Ewing v. Cloverleaf Bowl, Inc.*[85]

On the night of April 13, 1971, the plaintiff's intestate, Christopher Ewing, entered the Cloverleaf Bowl with several companions to celebrate his twenty-first birthday. The defendant, Lamont, a

82. *Id.* at 263, 30 Cal. Rptr. at 751.
83. *Id.*
84. *Id.* at 264, 30 Cal. Rptr. at 751.
85. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

bartender with approximately twelve years of experience, asked for Christopher's identification and upon receiving it supplied Christopher with a vodka collins "on the house." After consuming the drink, Christopher stated, "I'm twenty-one and I'm not even drunk."[86] To alleviate this condition, Christopher consumed ten straight shots of 151-proof rum and two beer chasers in a period of less than one and one-half hours. After consuming these liquors, Christopher entered a state of unconsciousness. His companions dragged him out of the Cloverleaf Bowl and took him to his parents' home. On the following morning, Christopher's mother discovered that he was dead.

At trial, the court granted the defendant's motion for a nonsuit, finding as a matter of law that the bartender's actions did not constitute willful misconduct. On appeal, the California Supreme Court reversed this finding. Justice Tobriner, writing for the court, concluded *inter alia* that a jury could reasonably find that Lamont engaged in willful misconduct.[87]

Justice Tobriner defined willful misconduct as the intentional doing of an act with a wanton and reckless disregard of its consequences or with knowledge that the act will probably cause serious injury.[88] To determine whether Lamont's conduct reached the level of willful misconduct, Justice Tobriner examined the "salient aspects" of Lamont's activities.

The justice listed at least eight aspects that he considered salient.[89] However, he did not disclose which aspects are essential to establishing a cause of action. This non-disclosure is to plaintiff's advantage. By interpreting Justice Tobriner's "salient aspects" liberally, a court may be able to establish a willful misconduct

86. *Id.* at 396, 572 P.2d at 1157, 143 Cal. Rptr. at 16.
87. *Id.* at 402, 572 P.2d at 1161, 143 Cal. Rptr. at 19.
88. *Id.* at 402, 572 P.2d at 1161, 143 Cal. Rptr. at 20.
89. The aspects are: (1) Lamont acted intentionally, (2) Lamont knew that Christopher was an inexperienced drinker, (3) Lamont knew of the radical difference in proof between ordinary liquor and 151-proof rum and could have concluded that Christopher was unaware of these differences, (4) Lamont knew Christopher intended to get drunk, (5) Lamont knew that his warning to Christopher to take it easy had been without effect, (6) Lamont could have concluded, or should have concluded, that Christopher might consume an amount of liquor hazardous to his health, (7) Lamont knew or should have known, in light of his experience, that beyond a certain level consumption of alcohol creates an immediate health hazard, and (8) Lamont acted in violation of two rules of practice at the Cloverleaf Bowl—he repeatedly filled the shot glasses beyond the seven-eighths line, and he continued to serve Christopher after he was obviously intoxicated. *Id.* at 402-03, 572 P.2d at 1162, 19 Cal. Rptr. at 20.

cause of action in cases in which S.B. 1645 would otherwise preclude liability.

In sum, by combining *Ewing, Dwan*, and *Cole*, a plaintiff may be able to circumvent the application of S.B. 1645 and establish a cause of action against any liquor purveyor. The possibility of establishing this cause of action will most likely turn upon the courts' attitude toward S.B. 1645.

The Habit-Forming Drug Analogy

Although it was not a tort to sell liquor at common law,[90] it was a tort knowingly to sell habit-forming drugs to another's *spouse* if the effect of the sale was to cause or aggravate the habitual use of the drug.[91] In 1940 the Supreme Court of Arizona, in *Pratt v. Daly*,[92] extended this tort liability into the area of intoxicating liquors.[93]

In *Pratt*, the defendants were tavern keepers who sold intoxicating liquors to the plaintiff's husband although they knew that he was an habitual drunkard. The plaintiff voiced her objection to these sales, and when the defendants persisted, she filed suit claiming loss of consortium. At trial, the jury awarded the plaintiff damages. On appeal, the Arizona Supreme Court affirmed the award.

Justice Lockwood, writing for the majority, stated that

> there are certain substances which, if used habitually, destroy the volition of the user to such an extent that he has no power to do aught but consume them when they are placed before him; that the consumption and the sale of such substances are, therefore, merged and become the act of the vendor; the sale is, therefore, the proximate cause of the loss . . . . The best known of these substances is opium . . . , but it is a well-known scientific fact that . . . the excessive use of intoxicating liquor may, and frequently does, have the same effect. We think it would be a narrow and illogical limitation of the rule to hold that because one habit forming substance is a "drug" in the technical sense of the term, and another is a "liquor", different rules should be applied to the use and sale thereof.[94]

Although this statement seems to impose a broad basis for liability, its import is narrowed in the remainder of the opinion. The court stated that although the use of drugs is presumed to destroy

---

90. *See* note 10 and accompanying text *supra*.

91. Pratt v. Daly, 55 Ariz. 535, 543, 104 P.2d 147, 150 (1940). *See* Holleman v. Harward, 119 N.C. 150, 25 S.E. 972 (1896); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917); Hoard v. Peck, 56 Barb. 202 (App. Div. N.Y. 1867).

92. 55 Ariz. 535, 104 P.2d 147 (1940).

93. *See also* Swanson v. Ball, 67 S.D. 161, 163, 290 N.W. 482, 483 (1940) ("independent of any specific statute the wife has a cause of action against anyone wrongfully interfering with the marital relationship regardless of the agency or instrumentality employed to inflict the loss").

94. 55 Ariz. at 544-45, 104 P.2d at 151.

the volition of the user, the use of liquor does not carry the same presumption.[95] Therefore, before the sale of liquor can constitute tortious conduct, the plaintiff must prove: (1) the consumer of the liquor had reached a state in which he lacked the willpower to refuse to drink the liquor, (2) the purveyor knew that the consumer had reached this state, and (3) despite his knowledge of the consumer's condition, the purveyor continued to furnish the liquor.[96] Once these conditions exist, the sale and the consumption of the liquor are merged and become the proximate cause of the damages.

This reasoning contravenes the clear language of S.B. 1645. Nevertheless, the exception has been cited in California's "prior judicial interpretation."[97] If the exception does exist, however, the class of plaintiffs is restricted to the spouse of the consumer. This restriction severely limits the utility of the *Pratt* exception.

The Duty of a Proprietor

Apart from the rule concerning the sale of intoxicating liquor, the proprietor of a liquor establishment has a duty to exercise reasonable care to protect his patrons from injuries caused not only by the conditions of the premises, but also through the negligent acts of other invitees when he has reasonable cause to anticipate such acts.[98]

The proprietor's duty arises from two considerations. First, the patron has a right to assume he is in an "orderly house."[99] Second, the proprietor is in a better position to eliminate the dangers on his premises.[100] Additionally, the proprietor is held to a high standard of care because of the dangers connected with large groups of intoxicated individuals.[101] Nonetheless, the proprietor

95. *Id.* at 545, 104 P.2d at 151.
96. *Id.*
97. *See* Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955). In *Cole*, the majority opinion cites and distinguishes *Pratt*. *Id.* at 353-54, 289 P.2d at 454-55. The dissenting opinion cites *Pratt* with approval. *Id.* at 363-65, 289 P.2d at 460-62.
98. Thomas v. Bruza, 151 Cal. App. 2d 150, 154-55, 311 P.2d 128, 131 (1957); 45 AM. JUR. 2d *Intoxicating Liquors* § 557 (1969); Annot., 70 A.L.R.2d 645 (1960).
99. Thomas v. Bruza, 151 Cal. App. 2d 150, 154, 311 P.2d 128, 131 (1957).
100. *Id.* at 155, 311 P.2d at 131.
101. 45 AM. JUR. 2d *Intoxicating Liquors* § 557 (1969).
> While the standard of care is that of an ordinarily prudent person, yet it must be realized that reasonable care is a relative term in that the degree of care must be commensurate with the risks and dangers attending the activity being pursued. It is a subject of common knowledge that the con-

is not an insurer of his patron's safety.[102] A complaint which alleges only that the plaintiff's injury was caused by the proprietor's sale to a pugnacious and quarrelsome patron does not state a cause of action.[103] However, if the proprietor fails to protect his patron from the violence of known pugnacious, drunken customers, he is liable for the damages sustained by the innocent patron.[104] Although this duty provides an injured party with an alternative theory of liability, the utility of the theory ends with the geographical boundaries of the purveyor's property.

Interference with the Consumer's Customary Duties

This exception to the early common-law rule is stated broadly: when the continued sale of intoxicating liquors results in a person's inability to perform the duties owing by him to another, the seller is liable in damages to persons to whom the duty was owed.[105] In point of fact, this exception is not as broad as the statement indicates. It has been elucidated only in dictum,[106] and liability has attached only when the purveyor has furnished the liquor to another's spouse[107] or minor child.[108]

Although the "customary duties" exception has been cited in the dissenting opinion of a California decision, it has not been followed.[109] Additionally, the justice citing the exception recognized its limitation. He stated that unless the person to whom the

---

sumption of a procession of drinks of intoxicating liquors produces a variety of reactions in the deportment of human beings, the development of which emotions the tavern-keeper should be reasonably alert to detect.

Reilly v. 180 Club, Inc., 14 N.J. Super. 420, 424, 82 A.2d 210, 212 (1951).

102. Kingen v. Weyant, 148 Cal. App. 2d 656, 661, 307 P.2d 369, 372 (1957); 45 AM. JUR. 2d *Intoxicating Liquors* § 557 (1969).

103.

[I]f the proprietor of a saloon is so negligent as to the character of his patrons who frequent his establishment that he is as likely to cause damage to his innocent patrons by neglecting to guard them against the violence of known pugnacious, drunken men and evildoers as by neglecting to prevent a good citizen from falling on a newly waxed floor or from falling through a trapdoor into his cellar, then he is liable for his negligent failure to protect the innocent patron.

Thomas v. Bruza, 151 Cal. App. 2d 150, 153-54, 311 P.2d 128, 130-31 (1957).

104. *Id.*

105. Cole v. Rush, 45 Cal. 2d 345, 361, 289 P.2d 450, 459 (1955) (Carter, J., dissenting); W. WOOLLEN & W. THORNTON, THE LAW OF INTOXICATING LIQUORS § 1029 (1910).

106. Holleman v. Harward, 119 N.C. 150, 25 S.E. 972 (1896); Hoard v. Peck, 56 Barb. 202 (App. Div. N.Y. 1867). These cases concerned the sale of laudanum (an opium derivative) to a husband's spouse.

107. *See* note 106 *supra.*

108. Struble v. Nodwift, 11 Ind. 64 (1858).

109. Cole v. Rush, 45 Cal. 2d 345, 361, 289 P.2d 450, 459-60 (1955) (Carter, J., dissenting) (citing W. WOOLLEN & W. THORNTON, THE LAW OF INTOXICATING LIQUORS § 1029, at 1837 (1910)).

buyer owes a duty has a "peculiar interest" in the buyer, such as a wife in her husband or parents in their child, and the seller knows that liquor has injurious effects upon the buyer, the cause of action is not available.[110]

It is submitted that a "peculiar interest" can exist in parties other than a spouse or a parent. If the purveyor has knowledge of a peculiar interest, and the injuries that will flow from his interference with this interest are foreseeable, it is arguable that the doctrine should be extended.

Senate Bill 1175: The Minors Exception

As a compromise measure to S.B. 1645, California's legislature passed Senate Bill 1175.[111] Governor Brown approved S.B. 1175 on the same day he approved S.B. 1645. S.B. 1175 provides an exception to the common-law rule that S.B. 1645 reenacts. In pertinent part, S.B. 1175 states:

> [A] cause of action may be brought by or on behalf of *any person* who has suffered injury or death against any [licensee] who sells, furnishes, [or] gives . . . any alcoholic beverage to any *obviously intoxicated minor* where the furnishing . . . is the *proximate cause* of the personal injury or death sustained by such person.[112]

Although this cause of action will lessen the impact of S.B. 1645, its effect will be negligible when compared to the remedies that were available under *Vesely* and *Coulter*.

In 1975, there were 17,000 nationwide arrests of persons under

---

110. *Id.*

111. Ch. 930, 1978 Cal. Stats. (to be codified as CAL. BUS. & PROF. CODE §§ 25602.1-.3).

112. *Id.* § 1 (emphasis added). Originally, S.B. 1175 provided that only a commercial vendor would be liable to a third party for injuries caused by the furnishing of alcoholic beverages to obviously intoxicated individuals. Additionally, the original bill required a plaintiff to prove by clear and convincing evidence that the vendor had violated CAL. BUS. & PROF. CODE § 25602 (West 1964) before the plaintiff could claim that the defendant was presumptively negligent. The bill was amended in a joint Senate-Assembly conference on August 23, 1978. By enacting the original draft of S.B. 1175 the legislature could have immunized the social host from liability and tempered the liability imposed on the commercial vendor. Instead, the legislature exempted both the social host and the commercial vendor from liability by enacting S.B. 1645.

Critics of S.B. 1645 charged that Governor Brown's approval of S.B. 1645 was the result of "an unholy alliance . . . struck between Governor Brown and the California liquor lobby." L.A. Daily Journal, Sept. 6, 1978, at 1, col. 6. "It's election year and the governor is selling out to the liquor interests. To give bar owners complete immunity for tortious acts is completely outrageous." *Id.* (statement of Sen. Bob Wilson).

eighteen years of age for driving while under the influence of alcohol.[113] In 1976, there were 257,846 *adult* misdemeanor arrests for drunk driving reported in California alone.[114] In round figures, this means that intoxicated adult drivers in California outnumbered all intoxicated minor drivers fourteen to one. Consequently, it is clear that S.B. 1175 will not compensate the majority of persons injured by another's purveyance of alcoholic beverages.

CONCLUSION

The policy considerations examined in this Comment support the California legislature's exemption of the social host from civil liability. However, these same policy considerations dictate a conclusion that the commercial vendor should not be immunized from civil liability. The commercial vendor can absorb any losses he might incur by spreading these losses among the buying public. The legislature either has failed to recognize or has ignored this fact. Consequently, an injured party will have to rely upon exceptions to the common-law rule which may not provide an opportunity for adequate compensation. California's next legislative assembly should remedy this problem by repealing that portion of S.B. 1645 which exempts the commercial vendor from liability.

DON HALL

113. Coulter v. Superior Court, 21 Cal. 3d 144, 154, 577 P.2d 669, 675, 145 Cal. Rptr. 534, 540 (1978) (citing CAL. DEP'T OF JUSTICE, CRIMINAL JUSTICE PROFILE—1976, at 25).

114. *Id.* (citing U.S. NEWS & WORLD REPORT, July 11, 1977, at 33).